

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

SCOTT MICHAEL HILL,

Petitioner,

v.

PATRICK GLEBE,

Respondent.

CASE NO. 14-5330 RJB-JCC

ORDER ADOPTING REPORT AND  
RECOMMENDATION

This matter comes before the Court on the Report and Recommendation of U.S. Magistrate Judge J. Richard Creatura. Dkt. 26. The Court has considered the Report and Recommendation (Dkt. 26), Respondent's Objections in part to the Report and Recommendation (Dkt. 27), and Petitioner's Response to Objections in part to Report and Recommendation (Dkt. 28), and the remaining file.

In this 28 U.S.C. § 2254 case, Petitioner seeks habeas corpus relief from a 507 month sentence after being convicted in of first degree burglary, attempted first degree murder, second degree assault, felony harassment, and malicious mischief in connection with his attack of a girlfriend and her family in their family home. Dkt. 1. Petitioner advances two grounds for

1 relief: (1) Trial counsel and post-conviction counsel were ineffective when they failed to  
2 properly investigate and present evidence of a diminished capacity defense, and (2) trial counsel  
3 was ineffective when he failed to object to the prosecutor's improper closing arguments. Dkt. 1.

4 The Report and Recommendation provides the factual and procedural background, and  
5 for present purposes, is adopted here. Dkt. 26, at 1-8. In the Report and Recommendation,  
6 Petitioner's motion to expand the record is granted. *Id.*, at 12. The Report and  
7 Recommendation recommends that this Court conduct an evidentiary hearing on the first ground  
8 for relief. *Id.*, at 12-17. It recommends that the second ground for relief be denied. *Id.*, at 17-19.

9 Respondent raises the following objections: (1) An evidentiary hearing is barred because  
10 the statute limits the Court's review to the record before the state courts when they adjudicated  
11 the merits of Petitioner's claims under *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011); (2)  
12 regardless of whether the state courts adjudicated the merits of the claim, 28 U.S.C. § 2254(e)(2)  
13 bars an evidentiary hearing because Petitioner failed to develop the factual basis of his claim in  
14 state court, and (3) the first claim for relief fails on the merits. Dkt. 27.

15 Petitioner responds and argues that (1) Respondent incorrectly asserts that Petitioner's  
16 first ground for relief was adjudicated the merits of his claim that his trial counsel was ineffective  
17 for failing to present a diminished capacity defense – it was not; accordingly he is entitled to an  
18 evidentiary hearing; (2) Respondent's assertion that he does not affirmatively assert the defense  
19 of exhaustion and procedural default is irrelevant; (3) dismissal under 28 U.S.C. § 2254(b)(2) is  
20 not permissible in this case; and (4) the claim should not be dismissed on the merits. Dkt. 28.

21 The Report and Recommendation (Dkt. 26) should be adopted. Respondent's objections  
22 are addressed in the Report and Recommendation. They do not provide a basis not to adopt the  
23 Report and Recommendation.

Whether Petitioner is entitled to an evidentiary hearing is a close question, however. A motion to certify an interlocutory decision regarding this issue, pursuant to 28 U.S.C. § 1292(b), if any, should be carefully drafted and filed in accord with the statute. If no such motion is made, the parties should be ordered to file a joint status report addressing a discovery timeline, briefing schedule, and earliest possible date for hearing, on or before April 17, 2015.

It is **ORDERED** that:

- (1) The Report and Recommendation (Dkt. 26) **IS ADOPTED**;
- (2) Petitioner **IS ENTITLED** to an evidentiary hearing;
- (3) Petitioner's second ground for relief **IS DISMISSED**; and
- (4) If no motion pursuant to 28 U.S.C. § 1292(b), is made, the parties **SHALL FILE** a joint status report on or before **April 17, 2015**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 17<sup>th</sup> day of March, 2015.



ROBERT J. BRYAN  
United States District Judge